

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

GLASS LAKE V. HOFER

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

GLASS LAKE, L.L.C., APPELLANT,
V.
CURT HOFER, APPELLEE.

Filed March 30, 2010. No. A-09-838.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge.
Reversed and remanded for further proceedings.

Kirk E. Goettsch, of Parsonage, Vandenack & Williams, L.L.C., for appellant.

Trenten P. Bausch and Theresa D. Koller, of Cline, Williams, Wright, Johnson &
Oldfather, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Glass Lake, L.L.C., appeals an order of the district court for Douglas County, Nebraska, granting summary judgment in favor of Curt Hofer in this breach of contract action. On appeal, Glass Lake asserts, among other things, that the court erred in granting summary judgment because there remained genuine issues of material fact concerning the financing contingency in the parties' contract. We find that there remain genuine issues of material fact and that summary judgment was inappropriate, and we reverse, and remand for further proceedings.

II. BACKGROUND

On April 13, 2009, Glass Lake and Hofer entered into a contract for the sale of real property from Glass Lake to Hofer. The contract included a sales price of \$4.5 million with \$4 million in cash or its equivalent due from Hofer at closing on May 22.

Among the provisions of the contract was a section titled “Applicable Conditions,” which provided that the agreement was conditioned upon the happening of each of the events listed thereafter and that if each of the events had not occurred within the time stated, the offer would be null and void. One of the “Applicable Conditions” listed in the contract was “[f]inancing in the amount of \$4,000,000.00 committed to by the Bank of Bennington and other participating lenders (“Lender”) before 2:00 P.M. CST April 16, 2009, to buyer or its lender approved assignee, unless waived in writing by Buyer prior thereto.”

At approximately 2:40 p.m. on April 16, 2009, Hofer sent an e-mail to Ronald Parsonage and Gene DeBoer, Glass Lake’s attorney and accountant, respectively, indicating Hofer’s intention not to go through with the deal. In that e-mail, Hofer indicated that “[t]he problem that I cannot overcome [with respect to the Glass Lake project] is getting rid of the gravel in this market. There doesn’t appear to be a big enough market in this area with all the competition to move what we would need to make this work.” Hofer also indicated in the e-mail that “I did get the financing lined up but it appears to be too risky at that price.”

On May 15, 2009, Glass Lake filed a complaint alleging that Hofer had breached the contract. Glass Lake specifically alleged, among other things, that “[a]ll conditions to the Agreement had been or were capable of being completed prior to or at closing including Hofer’s financing.” On June 10, Hofer filed an answer in which he individually responded to each paragraph of Glass Lake’s complaint and in which he specifically denied the paragraph in which Glass Lake alleged that the financing condition had been or was capable of being completed prior to or at closing.

Also on June 10, 2009, Hofer filed a motion for summary judgment. At a hearing on July 8, Hofer offered three exhibits in support of his motion for summary judgment: an affidavit from the chief executive officer for the Bank of Bennington, an affidavit and deposition of the chief executive officer for the Bank of Bennington with Hofer’s financial information redacted, and an unredacted copy of the deposition of the chief executive officer for the Bank of Bennington. In response, Glass Lake offered three exhibits: an affidavit of the managing member of Glass Lake; an affidavit of another member of Glass Lake; and an affidavit of Glass Lake’s attorney, which included a copy of the e-mail Hofer sent on April 16, 2009.

In her affidavit, the chief executive officer for the Bank of Bennington averred that “[a]t no time did the Bank of Bennington and the participating lenders commit to finance four million dollars (\$4,000,000) to Curt Hofer . . . regarding . . . Hofer’s . . . offer to purchase real estate held by Glass Lake, L.L.C.” In her deposition, she testified that the Bank of Bennington had prepared a loan memorandum concerning a possible loan to Hofer of \$3.3 million for the purchase of real estate held by Glass Lake. She testified that Hofer had requested a loan in an amount between \$3.5 million and \$4 million. She also testified that Hofer had called and left her a voice message withdrawing his loan request and indicating that he was not comfortable “with the gravel portion” of the property and that because he “simply didn’t have enough time to get his arms around the gravel piece [he] was no longer interested.” She testified that she later spoke with Hofer on the telephone, that he iterated the same concerns about the gravel on the property, and that he never expressed any dissatisfaction with the amount of the loan the bank was willing to make. Finally, when asked about other banks that were involved with the subject real estate that would also have been involved in the transaction between Hofer and Glass Lake, she testified

that there were two other banks, that she had spoken with their representatives on the telephone, and that “they approved their participation portions of the loan.” On cross-examination, she clarified that the proposed \$3.3 million loan would have comprised \$1 million from the Bank of Bennington and \$1.15 million from each of the other two banks.

In his affidavit, the managing member of Glass Lake averred that he had a telephone conversation with Hofer on April 16, 2009, during which Hofer stated that “he had his financing lined up but he expressed concerns about the gravel sales aspect of the development plan.” He averred that Glass Lake was not aware until receipt of Hofer’s motion for summary judgment and accompanying affidavit of the chief executive officer of the Bank of Bennington that Glass Lake was aware that Hofer was taking the position that the financing contingency had not been met. Finally, he averred that on May 6, he had a personal meeting with Hofer during which Hofer indicated “yet again that [the] Bank of Bennington had given him the financing he wanted.”

On July 30, 2009, the district court entered an order granting summary judgment in favor of Hofer. The court found that the contract was unambiguous, that one contingency in the contract was that Hofer obtain financing of \$4 million from the Bank of Bennington and other participating lenders, that the contingency was not met, and that the contingency was not waived by Hofer. The court found that there were no genuine issues of material fact. This appeal followed.

III. ASSIGNMENTS OF ERROR

Glass Lake assigns as error that the failure of the financing condition was not properly raised by Hofer in the court below and that the court erred in granting summary judgment because of the existence of genuine issues of material fact.

IV. ANALYSIS

1. PROPER RAISING OF ISSUE

Glass Lake first goes to great lengths to argue that Hofer failed to properly raise the failure of the financing contingency as an affirmative defense in the court below. Glass Lake asserts that Hofer failed to specifically plead the failure of the financing contingency as an affirmative defense and that, accordingly, it was improper to grant summary judgment on the basis of the issue.

We reject Glass Lake’s argument. In its complaint, Glass Lake specifically alleged that the financing contingency had been or was capable of being satisfied either before or at the time of closing. Hofer specifically denied this allegation. We conclude that Hofer thus sufficiently raised the issue of the financing contingency. Additionally, it is apparent from reading the exhibits offered by Glass Lake in opposition to summary judgment that Glass Lake was prepared to respond and did respond to the assertions raised by Hofer concerning the financing contingency, and Glass Lake did not argue to the court below that the issue had not been properly raised. As such, we find no merit to this assertion by Glass Lake.

2. SUMMARY JUDGMENT

(a) Standard of Review

In reviewing a trial court's grant of summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Johnson v. Anderson*, 278 Neb. 500, 771 N.W.2d 565 (2009). Summary judgment is proper when the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009).

(b) Discussion

Glass Lake asserts, among other things, that there exists genuine issues of material fact concerning the financing contingency and whether Hofer waived the necessity of securing financing in the amount of \$4 million. Upon our review of the record presented, we agree.

As noted, the contract included a provision specifying that one condition to Hofer's obligation to proceed with the purchase of the real estate was that Hofer obtain financing in the amount of \$4 million "committed to by the Bank of Bennington and other participating lenders" prior to 2 p.m. on April 16, 2009, "unless waived in writing by [Hofer] prior thereto." We note that the contract does not contain any definition of "other participating lenders," and no testimony was offered by Hofer or any representative of Glass Lake to indicate what the term means.

The evidence adduced at the hearing demonstrated that Hofer made affirmative representations to Glass Lake, on more than one occasion, that he had, in fact, secured the necessary financing to go forward with the purchase. Evidence adduced from the chief executive officer of the Bank of Bennington indicated that her bank and two other "participating lenders" were willing to finance \$3.3 million, but not the full \$4 million required by the contract. There was no evidence adduced, by Hofer or anyone else, concerning whether any other lenders were involved or might have indicated a willingness to provide the remainder of the \$4 million in financing.

When Hofer e-mailed his notice to Glass Lake that he was not going to proceed with the deal, just after the 2 p.m. deadline on April 16, 2009, Hofer specifically indicated that he "did get the financing lined up" but that he was not willing to go forward with the deal because of concerns over "getting rid of the gravel in this market." Similarly, the chief executive officer of the Bank of Bennington testified that Hofer had withdrawn his loan application because of concerns over disposal of gravel on the property, not over any concern about the amount of the loan he was able to secure. Hofer's representations concerning having secured sufficient financing, combined with the evidence that the Bank of Bennington and two other participating lenders were willing to finance \$3.3 million but not \$4 million, combined with Hofer's representations that he was not going forward with the deal because of concerns about gravel (a matter not addressed in the contract or its conditions), creates a genuine issue of material fact concerning whether Hofer actually secured sufficient financing to satisfy the condition and

whether Hofer was waiving the necessity of obtaining the full \$4 million in financing. As such, summary judgment was improper.

V. CONCLUSION

We find that there exists a genuine issue of material fact concerning whether Hofer secured sufficient financing to satisfy the condition in the contract and whether Hofer waived the necessity of receiving the full amount of financing specified in the contract. As such, we find that summary judgment was improper, and we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.